

THIS DECISION IS NOT  
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re ProMark Brands Inc.

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Serial No. 75941977

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Bert A. Collison and Gianfranco G. Mitrione of Duane Morris  
for applicant.

Ira Goodsaid, Trademark Examining Attorney, Law Office 115  
(Tomas Vlcek, Managing Attorney).

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Before Seeherman, Quinn and Bottorff, Administrative  
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by ProMark Brands Inc. to  
register the mark shown below



for "baby food."<sup>1</sup>

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<sup>1</sup> Application Serial No. 75941977, filed March 11, 2000, based on  
an allegation of a bona fide intention to use the mark in

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when used on applicant's goods, so resembles the previously registered mark NATURE'S GOODNESS for "dietary supplements, vitamins and minerals, and herbs, botanicals, extracts, concentrates, constituents and combinations for use as dietary supplements"<sup>2</sup> as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs. An oral hearing was not requested.

Applicant contends that the marks are different in sound, appearance, meaning and commercial impression. Applicant points to the stylized print and the heart design feature in its mark, the latter of which is "so intertwined with the words NATURE'S GOODNESS" that, according to applicant, "[t]he purchasing public would not mentally dissect applicant's mark but would recognize the mark in its entirety and not simply by the words alone." (Brief, p. 4). Applicant contrasts this with the cited mark which "appears on registrant's label without a design in print so

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commerce. Applicant subsequently filed an amendment to allege use setting forth a date of first use anywhere and a date of first use in commerce of July 31, 2000.

<sup>2</sup> Registration No. 2576369, issued June 4, 2002.

small that it is extremely difficult for a potential purchaser to determine whether the mark is associated with the registrant's dietary supplements." (Brief, p. 4). As to sound, although applicant admits the similarity therein, applicant asserts that sound does not play a part in the sale of applicant's goods because "a potential purchaser does not order these products by 'calling for the goods' but merely reaches up and takes whatever baby food product he or she has been using." (Brief, p. 5). As to the goods, applicant states that baby food is different from dietary supplements, and that "parents take great care in choosing food for their babies and it is not logical to believe that parents, as sophisticated consumers, would be so confused as to buy registrant's goods rather than applicant's baby food to feed their baby." (Brief, p. 7). Applicant further contends that its baby food is sold in grocery stores and supermarkets in a particular section whereas registrant's dietary supplements are sold in vitamin or health food specialty stores. Lastly, applicant highlights the absence of any instances of actual confusion, setting forth details of its own significant sales and advertising figures. In urging reversal of the refusal, applicant submitted a copy of registrant's label bearing the registered mark; copies of a variety of

applicant's promotional items bearing the mark sought to be registered, including coupons and advertisements for its baby food, as well as excerpts taken from applicant's web site on the Internet; copies retrieved from the PTO's TARR database of fifteen third-party registrations of marks which include, as a portion thereof, the terms "NATURAL" and/or "GOODNESS," or variations thereof, in the food field; and the affidavit of Stephen Ward, a private investigator in intellectual property matters.

The examining attorney maintains that the literal portions of the marks are identical, and that the cited mark, being presented in typed form, is not limited to any particular depiction. According to the examining attorney, neither the stylization nor the design feature of applicant's mark sufficiently distinguishes it from registrant's mark. With respect to the goods, the examining attorney claims that baby food and dietary supplements are related products. Further, the examining attorney points to the absence of any restrictions in the respective identifications of goods and, thus, contrary to applicant's arguments, it must be presumed that the goods move in normal trade channels for such goods. The examining attorney concludes that the trade channels and classes of purchasers would overlap. In support of the

refusal, the examining attorney introduced four third-party registrations that show that entities have adopted a single mark for both types of goods involved herein.<sup>3</sup>

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also: *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also: *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

With respect to the marks, we recognize that there are similarities between them in sound, appearance and meaning. We find, however, that the highly suggestive nature of the marks is a significant factor to consider in this case.

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<sup>3</sup> The examining attorney submitted six additional third-party registrations to support the same proposition. These registrations, however, are not use-based, but rather were registered pursuant to Section 44 of the Trademark Act. Accordingly, these registrations are of no probative value in our analysis.

See *In re Dayco Products-Eaglemotive Inc.*, 9 USPQ2d 1910 (TTAB 1988). The respective marks convey the notion that the product sold thereunder comes from the goodness of nature. Or, to put it more simply, that the product is "natural." This meaning is highly suggestive, and it hardly need be stated that this suggestion is pervasive in the food industry. The fifteen third-party registrations of marks including the term "NATURE" and/or "GOODNESS" or variations thereof highlight the fact that "nature" and "goodness" have in the past appealed to others in the food industry as appropriate terms for inclusion in a mark to convey the "natural" suggestion. The mere common presence in the two marks of the highly suggestive words "NATURE'S GOODNESS," which convey the ubiquitous notion that the product is "natural," is insufficient here to support a finding of likelihood of confusion. See: *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); and *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976). Also, the addition of the distinctive apple/heart design in applicant's logo mark serves to further distinguish this mark from registrant's mark.

We turn next to the second du Pont factor, that is, the similarity or dissimilarity of the parties' respective

goods and/or services. As has been often stated, there can be no "per se" rule that all food products are related by nature or by virtue of their capability of being sold in the same grocery stores and supermarkets. Interstate Brands Corp. v. Celestial Seasonings, Inc., 576 F.2d 926, 198 USPQ 151 (CCPA 1978); and Hi-Country Foods Corp. v. Hi Country Beef Jerky, 4 USPQ2d 1169 (TTAB 1987). At the same time, it is not necessary that the goods and/or services of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods and/or services of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods and/or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); and In re International Telephone & Telegraph Corp., 197 USPQ2d 910 (TTAB 1978).

The goods are distinctly different. Although both baby food and dietary supplements are presumed to travel in the same trade channels (grocery stores and supermarkets)

to the same classes of ordinary purchasers,<sup>4</sup> that nexus is too tenuous a connection on which to base a finding of likelihood of confusion herein, especially in view of the suggestiveness of the marks.

The evidence submitted by the examining attorney to show the relatedness of baby food and dietary supplements is sparse. The examining attorney introduced only four use-based third-party registrations (and one registrant owns two of them) which show that entities have adopted a single mark for both types of goods. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). However, because only three entities could be found with registrations for both baby food and dietary supplements, we cannot say that consumers would assume that both types of goods would

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<sup>4</sup> The issue of likelihood of confusion must be determined on the basis of the goods as they are identified in the involved application and registration. *Canadian Imperial Bank v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); and *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Inasmuch as the identifications of goods herein do not include any limitations, it is presumed that the goods move in all normal channels of trade, and that they are available to all classes of purchasers. Thus, applicant's evidence that the goods are sold in different types of stores is of no consequence. See *In re Bercut-Nandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).



emanate from the same source. The Office has simply not provided sufficient evidence for us to find that these goods are related.

The last factor of significance is the absence of any known instances of actual confusion, according to applicant, despite applicant's extensive use of its mark. Applicant asserts that the involved marks have been contemporaneously used since 2001, and sets forth substantial sales and advertising figures. During 2001-2003, applicant put total sales of its NATURE'S GOODNESS baby food at \$216 million, and total advertising expenditures at \$110 million. Thus, there appears to have been a meaningful opportunity for confusion to occur in the marketplace, yet applicant is not aware of any confusion. The absence of actual confusion weighs in favor of applicant.

Based on the record before us, we see the examining attorney's assessment of the likelihood of confusion as amounting to only a speculative, theoretical possibility, especially in view of the highly suggestive nature of the marks, and the differences between the goods.

Decision: The refusal to register is reversed.